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Supreme Court of the United States

October Term, 1963

NO. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, Petitioner,

versus

EDMUND V. COLE, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

We respectfully submit that the question stated by the petitioner at page 2 of his Petition as the question presented herein is *not* raised by the Circuit Court of Appeal's review and reversal of the District Court's decision in this case.

The only questions involved in this case at any stage of the proceedings have been the same, i.e.:

1. Was the automobile which struck the petitioner's decedent owned or operated by the respondent?

2. Was the driver of the automobile which struck the petitioner's decedent guilty of negligence or wilfulness which proximately caused the accident and the death of petitioner's decedent?

3. Was not the petitioner's decedent guilty of negligence or wilfulness proximately causing his own death and barring recovery therefor?.

These are all evidentiary questions of no "special or important" interest or concern to this Court.

STATUTES AND RULES INVOLVED

In addition to the statutes set forth in the Petition of the petitioner herein, which may or may not be applicable to this case, the following statutes are applicable herein:

Code of Laws of South Carolina, 1962.

"§ 26-7. *Proof of negligence by plaintiff in motor vehicle cases.*—The provisions of chapter 7 of Title 46 declaring prima facie speed limitations shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of the accident."

"§ 46-435. *Crossing at other than crosswalks.*—Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway. Between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

§ 46-436. *Pedestrians on roadways.*—Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. Where sidewalks are not provided, any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its

shoulder, facing traffic which may approach from the opposite direction."

STATEMENT OF THE CASE

The petitioner's decedent was struck and killed by an automobile driven by an unidentified motorist while the decedent was crossing an open, rural highway in the middle of the night of May 12-13, 1956, almost eight years ago.

Approximately a year later, in June, 1957, the decedent's married daughter, as administratrix of his estate and as his sole beneficiary, brought a wrongful death action in a South Carolina state court alleging under oath that the decedent was struck and killed by an automobile driven by a person other than the respondent in the present case. The evidence apparently being insufficient to establish the identity of the driver, however, the decedent's daughter abandoned the action a year later and took a voluntary non-suit in September, 1958.

There the matter rested for some three additional years. On January 27, 1961, however, almost five years after the events in question, the decedent's daughter again brought an action — the present case — for the alleged wrongful death of her father, this time using a different set of attorneys and a different, out-of-state, administrator as plaintiff (apparently selected for the purpose of creating the necessary diversity of citizenship for Federal jurisdiction). Although no additional evidence on the questions concerned had been discovered in the meantime, she also picked out a different defendant to sue, and a different theory of action.

The case was tried November 7-9, 1962, six and a half years after the incident concerned. The petitioner's entire evidence consisted of a rehash of what little evidence the Sheriff of the county concerned had been able to obtain during his investigation of the matter six and a half years before—although the Sheriff had concluded that the evidence pointed to a person other than the respondent as the

probable driver of the automobile in question but did not sufficiently identify the driver to make action against anyone justifiable. The memory of the petitioner's witnesses had, perhaps understandably, become clouded by the lapse of time, and whenever they attempted to deviate, whether inadvertently or otherwise, from the substance of their statements to the Sheriff as recorded in the Sheriff's report six and a half years before, they were forced on cross-examination to retreat to what they had told the Sheriff years before.

The little evidence adduced by the petitioner indicated that sometime between 12:45 and 1:00 A.M., during the night of May 12-13, 1956, at just about the time the respondent was going home to bed in Columbia, 60 miles away, the decedent, a 69-year old farmer who lived in that vicinity, was observed by a passing motorist walking west along the south shoulder of U. S. Highway 378 near the Sumter County-Clarendon County line in a rural area between Sumter and Turbeville, South Carolina, some sixty miles east of Columbia. His automobile was backed partly into the woods bordering the highway, two or three hundred yards to the east, more or less, at right angles to the highway. The headlights were off but the left front door was open and the dome-light was on. The two-lane asphalt highway was straight and level. The weather was clear and dry. No evidence was offered by the petitioner as to what the decedent was doing there at that time of night.

The motorist (the petitioner's witness Roberson), an insurance salesman returning from a date with his girl-friend, drove on east approximately three-quarters of a mile, turned around just beyond the County line, and drove back toward where he had seen the decedent. When he was within some five or six hundred yards of where he had seen the man, he saw a black "shadow" pass momentarily across the headlights of the first of two on-coming cars (traveling east). The car momentarily veered from its lane across the center line and over into his lane, then straightened out

and continued on in its own lane. As the car passed him, the salesman thought he recognized it as being the same pink 1956 Lincoln he had passed a few minutes before 12 or 13 miles back down the highway, two or three miles out of Sumter.

When he reached the spot where he had seen the shadow pass in front of the headlights of the other car, he found the decedent's body lying in the roadway, on his (the salesman's) side of the center line, i.e., in the north (or westbound) lane, and across the center line for traffic moving east (as the other car had been).

Both the motorist and the Sheriff testified that the skid marks found at the scene and presumably left by the automobile which struck the decedent started in the right lane (as viewed from that driver's viewpoint) at the point where the zigzagging started (R. 23-24, 51), i.e., that the driver was in his proper lane when he first saw the decedent in the roadway ahead of him and tried to avoid him by turning (or skidding) in the direction apparently offering the best hope of averting a collision.

About half an hour later, at about 1:30 A.M., May 13, 1956, a 1956 Lincoln was observed at a service station in Manning, South Carolina, on U. S. Highway 301, some 18-20 miles southeast of the spot where the decedent was run over. The body of the car was of a pinkish color; the witnesses disagreed as to the color of the top. The driver got out, bought a "coke" and a package of "nabs," and waited while his female companion went to the rest room. When she returned, the man and woman got back into the car and drove off at a leisurely pace in the direction from which they had come. The witnesses disagreed as to the length of time the car was at the service station (somewhere between eight and thirty minutes). While it was there, a service station attendant (petitioner's witness Harrington) observed some minor damage to the right rear side. He told the Sheriff during the investigation shortly afterward that the *right* front headlight was also out (De-

fendant's Exhibit A, R. 253). During the trial six and a half years later he tried to testify that the *left* front headlight was out but finally backed down and admitted that what the Sheriff had recorded him as saying during the investigation was more likely to be right than his recollection at the trial six and a half years later and that he would stand by what the Sheriff said he said (R. 23, 40). He also testified that the car had South Carolina license tags and a Fort Jackson sticker on the bumper.

The only evidence offered by the petitioner in support of his allegations of negligence and wilfulness was the testimony of the witness Roberson that *he* was driving "between 60 and 70" (R. 45) on his way home from a date and saw the headlights of the Lincoln which he had passed (and of another car which he also passed). Following along at a more or less uniform distance behind him, "a mile to a mile and a half" back (R. 57), and that after he had turned around and was coming back to where he had seen a man walking on the shoulder of the highway, he saw the headlights of an oncoming car momentarily veer from its lane across the center line, a second or two before he saw a "black shadow" in front of the headlights, and then straighten out and continue on in its own lane.

The only evidence offered by the petitioner in support of his allegation that the respondent owned the automobile which struck the petitioner's decedent was the testimony of the motorist and the service station attendant referred to above as to an automobile seen momentarily by the motorist some 12-14 miles before reaching the scene in question and a similar automobile seen by the service station attendant on a different highway 18-20 miles away half an hour later, the undenied fact that the respondent owned an automobile answering that general description, and testimony that some minor damage to the left front fender of the respondent's automobile (*not* the parts projecting furthest to the front) had been repaired, at a cost of only $122.39, by a former business associate of the respondent in Biloxi, Mississippi, several days later.

No evidence at all was offered by the petitioner in support of his allegation that the respondent was the driver of the automobile which struck the decedent. He sought to *infer* from the evidence summarized above that the automobile which struck the decedent belonged to the decedent, and then to go on from this and make the further inference that therefore the respondent must have been driving it at the time and place in question.

The conclusion which the petitioner sought to draw in this respect (an inference mounted on an inference) was refuted by direct evidence to the contrary, from both the petitioner's witnesses and the respondent's witnesses. The descriptions given by the petitioner's witnesses of the driver of the automobile (or automobiles) they had seen did not fit the respondent's unquestionable age and physical characteristics. They could not identify the respondent during the investigation immediately after the incident or at the trial six and a half years later. The Sheriff, who unquestionably had a closer view and a better knowledge of the case than anyone else then or now, testified that he "always figured it was" someone else—and obviously therefore could not have been the respondent. An unusually well-trained and experienced officer of the State Law Enforcement Division testified that after investigating the case he had concluded that the respondent was not the driver of the automobile which struck the decedent and that he could not connect the respondent with the case. Two disinterested witnesses testified that they saw the respondent talking business over a cup of coffee in a restaurant in Columbia, some 60 miles away, at the time the decedent was apparently struck and killed.

The respondent, a substantial business man who owns and operates a photographic studio at Fort Jackson, an Army base near Columbia, South Carolina, as well as other businesses elsewhere, voluntarily took the stand and testified as to what little he knew of the matter. He explained in detail his activities and whereabouts at the time in ques-

tion, and during the previous several days and the following several days. He flatly denied that it was his automobile which had struck the decedent and that he had been at the scene in question or at any of the spots where the petitioner's witnesses had allegedly seen an automobile (or automobiles) similar to the one he owned.

His testimony in this regard was corroborated by the testimony of two disinterested witnesses.

He gave an entirely reasonable and logical explanation as to the manner in which the damage to his automobile repaired in Mississippi had occurred, and as to why it had been repaired in Mississippi rather than in South Carolina, New York, or other places where he had business interests.

The significance of the testimony of the petitioner's witnesses as to the make and model of the automobile (or automobiles) which they had seen and as to the alleged presence of South Carolina license plates and a Fort Jackson identification sticker on the automobile (or automobiles) and the undoubted fact that the respondent had an automobile of that make and model with such plates and sticker was reduced to virtual irrelevance by the respondent's proof that there were 240 automobiles of that make and model registered in South Carolina and 488 in North Carolina at the time concerned, that in 1956 South Carolina license plates were virtually identical to North Carolina license plates—same size and shape, same color background, same color letters, same size letters, same arrangement and spacing—the only difference being the two letters different in "North" and "South"; and that the similarity caused difficulties in law enforcement that year and will not be allowed to happen again.

On the basis of the above evidence the trial judge concluded that the automobile which had struck the decedent was owned by the respondent, and returned a verdict for the petitioner. In doing so he ignored the lack of substantial evidence as to (1) the identity of the driver of the auto-

mobile which struck the decedent, (2) negligence or wilfulness on the part of the driver as (3) the proximate cause of the decedent's death, and the overwhelming evidence (4) that the decedent was guilty of negligence and wilfulness which was solely responsible for his death, and disregarded clearly applicable decisions by the South Carolina Supreme Court, the Fourth Circuit Court of Appeals, and this Honorable Court.

The Fourth Circuit Court of Appeals, clearly acting within the scope of appellate review specified by Rule 52(a) of the Federal Rules of Civil Procedure and the numerous decisions of this and other courts defining its meaning, readily noted (and pointed out in its opinion) the lack of substantial evidence of negligence or wilfulness on the part of the driver as the proximate cause of the decedent's death and the clear evidence that as a matter of law the decedent's own negligence and wilfulness was the cause of his death, and reversed the decision of the trial court. It did not find it necessary to decide who owned or was operating the automobile which struck the decedent at the time and place in question, as it had found that "the evidence will not support the (trial) court's findings with regard to primary and contributory negligence."

The decision of the Court of Appeals was unanimous.

The petitioner petitioned the Court of Appeals for a rehearing on substantially the same grounds presented in his Petition to this Court. The Court of Appeals, again in a unanimous opinion, held that no cause had been shown for a rehearing and consequently denied a rehearing.

ARGUMENT

I. INTRODUCTION AND SUMMARY.

Perhaps understandably, the petitioner has artfully couched his Petition in the language of Rule 19 of the Rules of this Honorable Court, in the obvious hope of thereby persuading this Court that it should exercise its discretion and grant a review of the decision of the Court of Appeals

On analysis, however, the arguments advanced by the petitioner are without merit.

We respectfully submit that there are no "special and important" reasons in this case for granting a review on writ of certiorari. There is a complete want of any substantial federal question, indeed of any federal question. There is no conflict between the decision of the Circuit Court and any decision of another court of appeals on the same matter. No important state question is involved. The decision of the Circuit Court is not in conflict with applicable state law. No departure from the accepted and usual course of judicial proceedings is involved.

The numerous cases cited by the petitioner clearly either have no application to the present case or do not support the positions of the petitioner. The case at bar arose in South Carolina and was decided in accordance with the law of South Carolina, and within the scope of appellate review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure and the numerous decisions of this Court and of the Courts of Appeal, including that of the Fourth Circuit.

The case at bar is nothing more or less than a traffic accident case involving one of the thousands of regrettable traffic accidents which occur in our country every year. A correct decision turns upon the circumstances of this particular case, not upon any question of general or special importance. The Supreme Court of the United States should not be called upon to decide such cases.

Although we do not consider that the petitioner's arguments contain sufficient merit to justify extended discussion, we shall consider them in turn hereinbelow, for the convenience and assistance of this Court. Since this is a respondent's brief, and for the sake of simplicity, it will be arranged to correspond to the arrangement of the petitioner's Petition herein.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OR AMONG THE COURTS ON THE ISSUES INVOLVED IN THIS CASE (Petitioner's Section 1).

The issue stated by the petitioner is a false issue as applied to the case at bar. The petitioner's entire argument rests upon his assertion that the Court of Appeals failed to limit its review to the requirements of Rule 52(a) which permits findings of fact to be set aside only if "clearly erroneous." The petitioner seeks to pose the issue "whether a district judge's findings of fact, *even though not clearly erroneous*, are subject to review and may be set aside by a federal appellate court where such findings are based upon conflicting inferences from undisputed evidence" (Petition, page 6). He then proceeds to try to demonstrate that there is an existing conflict among the circuits and within specific circuits upon that issue, pointing to various decisions which hold that a federal appellate court is empowered to set aside findings of fact based upon factual inferences from undisputed evidence without regard to the "clearly erroneous" rule and to other decisions holding to the contrary. The petitioner cites a number of cases and authorities discussing and illustrating the various theories and justifications adopted by some courts to permit a broader review in the case of findings of fact based on undisputed evidence.

It is not necessary for this Court to take on the considerable task proposed by the petitioner of determining whether or not there is in fact any conflict among the circuits or among the courts within some of the circuits to reach a correct decision in the present case. The issue here is much simpler.

Even if the supposed departure of some of the Circuit Courts from the "clearly erroneous" rule in the area of undisputed evidence might pose an interesting and intellectually stimulating problem, it is a purely academic problem in the present case for the reason that the *Fourth Circuit Court of Appeals in its opinion here concerned clearly*

applied the "clearly erroneous" requirement of Rule 52(a) in its strictest and uniformly recognized sense.

A simple examination of the Circuit Court's opinion discloses that the Court's review of the District Court's findings of negligence, proximate cause and lack of contributory negligence, and of the evidence upon which those findings were based, is completely in accord with the recognized test of "clearly erroneous." Although the petitioner boldly states that the Circuit Court predicated its decision on its own independent findings of fact, suggesting in effect a trial *de novo*, the Circuit Court in fact stated as the basis of its decision reversing the judgment that there was no substantial evidence to support the District Court's findings on negligence and contributory negligence. See for example the final, concluding paragraph of the Circuit Court's opinion (Appendix, Petitioner's Petition, page 29): "There being no substantial evidence to support the court's findings on negligence or contributory negligence, the judgment is Reversed." That statement is supported by other similar references throughout the opinion and by the Circuit Court's close analysis and discussion of the evidence, pointing out a specific and fatal failure of proof on each charge of negligence and further pointing to the clear evidence of contributory negligence which required, under previous decisions of the Circuit Court and of the South Carolina Supreme Court, a finding of contributory negligence as a matter of law.

The Circuit Court's review of the evidence for substance is clearly within the scope of review permitted by Rule 52(a). As stated in Vol. 2B *Federal Practice and Procedure*, Barron & Holtzoff, Section 1135:

> "Rule 52 plainly contemplates a review by the appellate court of the question whether there is substantial evidence to sustain the trial court's findings of fact. Substantial evidence is not merely some evidence. It must be more than a mere scintilla. It is evidence of such quality and weight as would justify a reasonable

per on in drawing the inference of fact made by the c t."

In order to determine whether or not a trial court's findings are "clearly erroneous" under Rule 52(a), a Circuit Court obviously must review the evidence. There is no other way a Circuit Court can determine whether the findings are clearly erroneous or not.

Decisions can be cited from every circuit which accept review by the Circuit Court of the question of whether there is substantial evidence to support the findings of fact as being within the scope of review permitted under Rule 52(a). See e.g. *Evans v. United States*, 319 F. 2d 751 (1st Cir. 1963); *Hyman v. Av. Winarick, Inc.*, 325 F. 2d 584 (2d Cir. 1963); *Allyn v. Abad*, 167 F. 2d 901 (3rd Cir. 1948); *Darter v. Greenville Community Hotel Corporation*, 301 F. 2d 70 (4th Cir. 1962); *Kwong v. Occidental Life Insurance Company of California*, 273 F. 2d 691 (5th Cir. 1960); *Wickman v. Vinco Corp.*, 288 F. 2d 310 (6th Cir. 1961); *Zeddis v. Commissioner of Internal Revenue*, 264 F. 2d 120 (7th Cir. 1959); *Tyson v. State of Iowa*, 283 F. 2d 802 (8th Cir. 1960); *Pacific Queen Fisheries v. Symes*, 307 F. 2d 700 (9th Cir. 1962); *Denver United States Nat. Bank v. Asbell Brothers Construction*, 294 F. 2d 289 (10th Cir. 1961); *Coleman v. United States*, 176 F. 2d 469 (D. C. Cir. 1949).

The petitioner is in fact forced to admit that findings of fact, whether based upon disputed evidence or upon inferences from undisputed evidence, may be set aside within the clearly erroneous rule when "*although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed" (a test consistently stated and applied by the Supreme Court and the Circuit Courts): *United States v. United States Gypsum Company*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948); *United States v. Oregon State Medical Society*, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); *McAllister v. United States*, 348 U. S.

19, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); and cases collected in Vol. 2B *Federal Practice and Procedure*, Barron & Holtzoff, Sec. 1133); "or *when not supported by substantial evidence* or are clearly against the weight of the evidence or induced by an erroneous view of the law." See page 10 of Petition.

This concession by the petitioner is a sufficient answer to this entire case and justifies a denial of the writ of certiorari sought by the petitioner. *It is apparent that the Circuit Court's approach to and review of the evidence here, its finding of a lack of substantial evidence to support the trial court's findings of negligence and proximate cause, and its decision that upon the entire evidence a finding of contributory negligence was required as a matter of law are clear applications by the Circuit Court of the above-stated tests of "clearly erroneous," within even the strictest rule as to the proper scope of appellate review.*

These are the principles consistently stated and followed by the Fourth Circuit Court of Appeals as to the proper scope of appellate review: See *Darter v. Greenville Community Hotel Corp.*, 301 F. 2d 70, 72 (1962), and the authorities therein cited.

We are unable to find any indication in the Circuit Court's opinion that the Court reviewed the trial court's findings in a manner which would disregard the requirements of the "clearly erroneous" rule or liberalize it in any manner. The Circuit Court certainly did not state that it was proceeding to review the evidence *de novo* or that it gave any less weight to the District Court's findings because based in part upon undisputed facts. Significantly, all the decisions cited by the petitioner in support of the asserted conflict in the permitted scope of review specifically state the degree of application which they give to the "clearly erroneous" rule or announce a departure from the rule in the particular instance concerned. In the absence of a statement by the Court of a departure from the "clear-

ly erroneous" test of a liberalization of the scope of review because of the nature of the evidence, we do not see how the Court can be assumed to have made such a departure or liberalization, particularly when the Court in express terms applied tests which are uniformly applied as being within the meaning of "clearly erroneous."

The petitioner's suggestions that the Circuit Court's approach to the findings of the District Court was that of making its own independent findings of fact based upon conflicting inferences from undisputed evidence and that the Circuit Court treated the District Court's findings of fact as conclusions of law are totally unsupported by anything in the Circuit Court's opinion. The Circuit Court cannot be said to have chosen between conflicting inferences. The Circuit Court, reviewing the evidence for instance, found that there could in fact be *no* conflicting inferences—i.e., *that the inferences adopted by the District Court, and naturally the conclusions based upon those inferences, were not supported by substantial evidence.*

It should also be noted that the Circuit Court's analysis of the evidence pointing to contributory negligence and its decision upon that issue parallels exactly its previous decision in *Smith v. Biggs*, 223 F. 2d 839 (4th Cir. 1955), in which certiorari was denied by this Honorable Court (350 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446).

In *Smith v. Biggs*, *supra*, which was also a diversity wrongful death action resulting from the decedent's being struck by an oncoming automobile while the decedent was walking upon, or attempting to cross, an open highway during the nighttime, the Fourth Circuit Court of Appeals held that the decedent was contributorily negligent as a matter of law and reversed a judgment in favor of the plaintiff by the same trial judge concerned here. In that case, as in the present case, there were no witnesses to the accident, but the Circuit Court of Appeals held that a finding of contributory negligence was required as a matter of law in view of the clear facts with respect to the conduct of the

decedent. The facts upon which the Court relied for its finding of contributory negligence are virtually identical to the facts shown by the undisputed evidence in the present case. The petitioner's assertions to the contrary in his Petition here are simply not so. Although the Court of Appeals in that case did not specifically discuss the "clearly erroneous" rule in those words, the decision is clearly in accordance with the requirements of that rule, and this Court was squarely presented with that issue by the Petition filed by the plaintiff with this Court for a writ of certiorari.

In his Petition for a writ of certiorari in *Smith v. Biggs* the petitioner therein alleged that the opinion was in conflict with decisions of this Court and of other circuit courts, specifically pointing to the rule that facts and inferences drawn therefrom determined by the trial court are binding in the absence of a "clearly erroneous" finding.

An examination of the Petition for a writ of certiorari in *Smith v. Biggs* (entitled *Biggs v. Smith*, Misc. No. 460, October Term 1955, in this Court) in fact discloses numerous similarities with the Petition in the present case in the arguments and grounds presented. The petitioner there posed numerous conflicts among the circuits which, in the final analysis, were based upon the petitioner's attributing to the Circuit Court of Appeals an incorrect or inadequate treatment of the evidence and which ultimately required a review of the evidence and of questions of fact. It was asserted further that the Court of Appeals had departed from the accepted and usual course of judicial proceedings by drawing unwarranted inferences from the proof and changing questions of fact to questions of law. The petitioner there also asserted that the decision of the Court of Appeals conflicted with previous decisions of the South Carolina Supreme Court and reviewed the South Carolina decisions at length in an effort to support that assertion.

Despite these assertions, this Court, quite properly, denied certiorari.

We submit that the holding of the Fourth Circuit Court of Appeals in Smith v. Biggs with respect to the issue of contributory negligence, and this Court's denial of a writ of certiorari for review of that decision, are sufficient in themselves to support the decision of that Court in the present case. We respectfully submit that the petitioner herein is merely seeking the same ultimate review in the present case that was denied by the Supreme Court in Smith v. Biggs and that the writ sought herein should also be denied, for the same reasons.

The Circuit Court, in the present case, having applied the "clearly erroneous" rule of Rule 52(a) in its strictest and most uniformly accepted sense, a determination by this Court of the permissibility of a more liberal scope of review than that required by the Rule can clearly have no effect upon the decision in this case, and we submit that the Supreme Court should not be called upon to decide an issue beyond the limits of the controversy. This Court has declared in Rule 19 of its Rules that its discretionary power of review upon writ of certiorari will be exercised only when there are "special and important reasons" therefor. A question of solely academic interest and importance is clearly not within the scope of Rule 19.

This is clearly indicated by this Court's discussion of Rule 19 in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955), in which a writ of certiorari was dismissed as improvidently granted. In that opinion the Court pointed out (99 L. Ed. 891, 900):

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which

may be deemed 'special and important' the Rule refers to cases

> 'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.'

"A federal question may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. *But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.* (Magnum Import Co. v. Coty, 262 U. S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531; see also address of Mr. Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v. vi.; Address of Mr. Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313. *'Special and important reasons imply a reach to a problem beyond the academic or the episodic.* . . ." (Emphasis added).

In the final analysis the most that could be accomplished as far as this controversy is concerned, (and what it actually sought by the petitioner) is to have this Court review the facts and evidence in this case and reverse the decision of the Circuit Court holding in effect that the findings of the District Court were clearly erroneous. We submit that the Supreme Court clearly should not exercise its discretion to grant a writ of certiorari for such a purpose in this case—a diversity negligence suit involving no question of construction or interpretation of any federal substantive law. It has long been the policy of the Supreme Court not to grant a writ of certiorari for the purpose of reviewing evidence and questions of fact. In *Southern Power Co. v. North Carolina Public Service Company*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413, a writ of certiorari was granted to review a judgment of the Circuit Court of Appeals for the Fourth Circuit modifying a judgment of the

District Court in a proceeding to compel the furnishing of electric current and power for certain public use. The Supreme Court dismissed the writ as improvidently granted, saying:

> "This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its re-examination that the decree would deprive petitioner of due process of law, and of freedom to contract, contrary to the Federal Constitution.
>
> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto."

Similarly, in *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918), the Supreme Court, dismissing a writ of certiorari as improvidently granted, said:

> "After hearing arguments upon the issues involved in this cause it seems clear that the writ of certiorari was improvidently granted and must be dismissed. Furness, W. & Co. v. Yang-Tsze Ins. Assoc. 242 U. S. 430, 61 L. Ed. 409, 37 Sup. Ct. Rep. 141.
>
> "The controversy presented in an action at law is over title to a tract of land in Texas. Both parties claim under one Felder,—petitioners through a deed said to have been executed June 10, 1839, and respondents through one dated June 18, 1859.
>
> "As grounds for granting the writ, petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed, (2) whether it was presented for record before execution of the later one, (3) whether vendee in

the junior deed was a bona fide purchaser for value, (4) whether the junior deed was forged, and (5) whether the action was barred by the three years Statute of Limitations. *The propriety of submitting these matters depended essentially upon an appreciation of the evidence:* Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the circuit court of appeals reached the same result. 141 C. C. A. 264, 226 Fed. 434.

"The record discloses no sufficient reason within the rule long observed why we should review the judgment below. Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665. (Emphasis added).

Also quite pertinent here is the statement of the Supreme Court in *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922 (1922):

". . . The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals, was given for two purposes: first, to secure uniformity of decision between the courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing . . .*" (Emphasis added).

In the very recent case of *Rudolph v. United States*, 370 U. S. 265, 82 S. Ct. 1277, 8 L. Ed. 2d 484 (1962), as summarized in the reported opinion of this Court:

"An insurance agent and his wife brought suit in the United States District Court for the Northern District of Texas to recover federal income taxes paid on the value of a one-week trip, awarded to them for the agent's selling a predetermined amount of insurance, to a 2½ day convention in New York City of the offi-

cers and employees of the agent's employer, one morning of which was devoted to a business meeting and group luncheon, the remaining time being given over to travel, sight-seeing, entertainment, fellowship or free time. Finding that the primary purpose of the trip was to award a bonus for a job well done, the District Court denied recovery. (189 F. Supp.). The United States Court of Appeals for the Fifth Circuit affirmed, approving the lower court's findings. (291 F. 2d 841).

"The United States Supreme Court, after granting certiorari, dismissed the writ as improvidently granted."

In a *per curiam* opinion this Court held (8 L. Ed. 2d 484, 486):

"The petition for certiorari in this case was granted because it was thought to present important questions involving the definition of 'income' and 'ordinary and necessary' business expenses under the Internal Revenue Code, 368 U. S. 913, 7 L. Ed. 2d 130, 82 S. Ct. 195. An insurance company provided a trip from its home office in Dallas, Texas, to New York City for a group of its agents and their wives. Rudolph and his wife were among the beneficiaries of this trip, and the Commissioner assessed its value to them as taxable income. It appears to be agreed between the parties that the tax consequences of the trip turn upon the Rudolphs' 'dominant motives and purpose' in taking the trip and the company's in offering it. In this regard, the District Court, on a suit for a refund, found that the trip was provided by the company for 'the primary purpose of affording a pleasure trip . . . in the nature of a bonus, reward, and compensation for a job well done' and that from the point of view of the Rudolphs it 'was primarily a pleasure trip in the nature of a vacation . . .' 189 F. Supp. 2, 4, 5. The Court of Appeals approved these findings. 291 F. 2d 841.

Such, ultimate facts are subject to the 'clearly erroneous' rule, cf. Commissioner v. Duberstein, 363 U. S. 278, 289-291, 4 L. Ed. 2d 1218, 1227, 1228, 80 S. Ct. 1190 (1960), *and their review would be of no importance save to the litigants themselves.* The appropriate disposition in such a situation is to dismiss the writ as improvidently granted. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 78 note 2, 99 L. Ed. 897, 903, 75 S. Ct. 614 (1955). (Emphasis added).

Under the principles stated in the foregoing decisions there is no need for this Court to take upon itself in this case the entire question of the proper scope of appellate review under Rule 52(a), as sought by the petitioner. The decision of the Circuit Court here is correct under even the strictest view of the scope of that Rule, and the permissibility of a broader scope of review is not concerned in the present case. If such a question exists at all, it need not, and should not, be decided here.

III. THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT (Petitioner's Section 2).

There is no conflict between the decision of the Circuit Court in the present case and the decisions of this Court as to the proper scope of appellate review of inferences drawn from documents or undisputed facts.

The petitioner's second argument proceeds upon the same false assumption that the Circuit Court failed to find the District Court's findings of fact "clearly erroneous" within the meaning of Rule 52(a). There is nothing in the Circuit Court's opinion which conflicts with any principle announced or applied by the Supreme Court in *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948), or *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960), relied upon by the petitioner.

In the *Gypsum* case, this Court pointed out that Rule 52(a) was applicable to findings which were inferences from undisputed facts but pointed out further that a finding is "clearly erroneous" under Rule 52(a) "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Court, applying the stated test of "clearly erroneous," set aside numerous findings of the District Court.

In the *Duberstein* case, this Court, in two companion cases, was presented with the question of whether certain transfers of property and money were gifts excludable from the transferee's gross income under Section 22(b)(3) of the Internal Revenue Code of 1939. The Court again stated that Rule 52(a) applied to factual inferences from undisputed basic facts and, applying the "clearly erroneous" rule in accordance with the test set forth in the *Gypsum* case, found that under the evidence before it in the first of the two companion cases the findings of the District Court could not be said to be clearly erroneous. In the second of the two cases the majority of the Court held that the simple and unelaborated finding by the District Court that the transfer in question was a "gift" was insufficient for the Court to make a determination of the correctness of the finding and required further proceedings for the purpose of presenting adequate findings of fact.

Clearly neither the *Gypsum* case nor the *Duberstein* case holds that findings based upon factual inferences from undisputed evidence must be allowed to stand even where the inferences are not supported by substantial evidence or where the reviewing court finds from the entire evidence that an inference reached by the trial court based upon undisputed evidence is clearly in error. On the contrary, a review within those limits is entirely supported by both decisions through the application of the "clearly erroneous" rule under the test announced in the opinions.

This is precisely the review made by the Circuit Court in the present case, and under the evidence in this case the Circuit Court held that the findings of the District Court were required to be set aside.

After reviewing the evidence under the universally accepted test of "clearly erroneous," the Circuit Court determined (1) that there was no substantial evidence of negligence on the part of the driver of the automobile concerned as the proximate cause of the decedent's death and (2) that on the entire evidence it was convinced that a mistake had been committed by the trial court and that the decedent, as a matter of law, was guilty of negligence or wilfulness proximately causing his own death. No departure from this Court's definition of the "clearly erroneous" rule was involved.

If a review of this nature is held to be beyond the scope of Rule 52(a), no review of findings based upon inferences from undisputed facts will remain whatsoever and a new rule will be required that such findings are to be regarded as conclusive on appeal.

The petitioner's assertion, on page 11 of his Petition, that despite this Court's decision in the *Duberstein* case, there is still a conflict among the circuits as to the applicability of the "clearly erroneous" rule to findings of fact based on inferences from undisputed evidence, does not constitute a valid reason why this Court should grant certiorari in this case. This Court has already expressly determined and stated, clearly and definitely, that the "clearly erroneous" rule does apply to factual inferences based on undisputed evidence. In view of these rulings by this Court, the Supreme Court of the United States, any continued conflict among the circuits—if there is any—as to whether the "clearly erroneous" rule applies to factual inferences from undisputed evidence is simply unjustifiable. This Court should not be called upon to exercise its discretion to grant a writ of certiorari in this case merely to repeat the position which it has clearly taken in the past and from which

it has never departed—particularly where, as here, the Circuit Court concerned has not transgressed the rule laid down by this Court.

No further decision on this point and no warning to the Circuit Court concerned here, are needed.

IV. THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH APPLICABLE STATE LAW (Petitioner's Section 3).

The Petitioner's assertion that the decision of the Circuit Court here is in conflict with applicable decisions of the South Carolina Supreme Court is simply not so and constitutes argument unworthy of the dignity of this Court.

Indeed the exact reverse is true. The trial court overlooked or disregarded clearly applicable South Carolina statutes and decisions of the South Carolina Supreme Court and of the United States Court of Appeals for the Fourth Circuit applying South Carolina law. The Circuit Court, realizing this, merely applied the correct law and, in so doing, necessarily reversed the decision of the trial court.

We respectfully submit that the decision of the Circuit Court is entirely in accord with all pertinent decisions and statutes embodying South Carolina law. See, for example, the following:

Miller v. East Georgia Motors, Inc., 303 F. 2d 488 (CCA 4, 1962) (reversing a similar decision by the same trial judge concerned here);

Smith v. Biggs, 223 F. 2d 839 (CCA 4, 1955), cert. denied 351 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446;

Williams v. Ford, 233 S. C. 304, 104 S. E. 2d 378 (1958);

Carma v. Swindler, 228 S. C. 550, 91 S. E. 2d 254 (1956);

Attaway v. One Chevrolet 5-P Truck, 228 S. C. 559, 91 S. E. 2d 270 (1956);

Thompson v. Washington, 206 F. 2d 147 (CCA 4: 1947);

Wright v. South Carolina Power Co., 205 S. C. 327; 31 S. E. 2d 904 (1944);

Lee v. New South Express Lines, 192 S. C. 527, 7 S. E. 2d 459 (1940);

Craig v. Clearwater Mfg. Co., 189 S. C. 176, 200 S. E. 765 (1938);

Moseley v. Southern Ry. Co., 164 S. C. 193, 162 S. E. 94 (1932).

See also the very recent case of *Hopkins v. Reynolds, et al.*, Smith's Advance Sheets, February 29, 1964 (not yet reported).

Every case cited by the petitioner reaching an opposite result from that reached in the above cases simply involves different evidence requiring a different result. They do not state different principles of law.

The petitioner's attempt to distinguish *Smith v. Biggs, supra*, and *Williams v. Ford, supra*, is totally without merit. In all relevant respects both cases are identical to the present case.

The petitioner states that *Smith v. Biggs* is not applicable here because there the occurrence took place in the defendant's proper lane of travel, whereas, here the respondent was on the wrong side of the center line when the decedent was struck. This is childish argument. The uncontradicted evidence here, from the petitioner's own witnesses, indicates beyond question that the automobile which struck the decedent was in its proper lane when the decedent appeared in the highway in its path and that the driver turned to the left in a desperate effort to avoid striking him.

The petitioner states that *Williams v. Ford* is not applicable here because there the defendant explained his presence on the wrong side of the road, whereas here the respondent offered no explanation as to his driving on the left of the center line. This is even worse. The petitioner's

own evidence clearly shows why the driver of the automobile which struck the decedent veered over the center line momentarily. The respondent's own explanation is even simpler: he was not there at all.

The petitioner's attempt to bring in the "public health, safety and welfare of the people of the State of South Carolina" as a reason for this Court to exercise its discretion to review the evidence in this case is wholly without merit. The petitioner apparently bases this argument on the hit-and-run aspect of the case. This is the same approach he tried unsuccessfully in the Circuit Court, i.e., to convince the Court by a series of unfortunate circumstances, coincidences, and conjectures, and inferences mounted on inferences, that the automobile which caused the decedent's death belonged to the respondent, in the apparent hope that by thus connecting the respondent, to some degree at least, with an unfortunate tragic accident, he could persuade the Court to overlook the lack of evidence of the real elements of his case, and the overwhelming evidence that the decedent was clearly responsible for his own death in trying to cross an open highway in the middle of the night in the path of two or more clearly visible oncoming automobiles.

We are confident that this Court will not be so easily misled.

The respondent obviously cannot be held responsible, morally or legally, for the tragic consequences of a hit-and-run accident until it has been proved by substantial evidence that *he* was the driver of the hit-and-run automobile. We submit that the evidence in this case, including the evidence from the petitioner's own witnesses, indicates exactly the reverse, i.e., that the respondent was *not* the driver of the automobile in question, and that the Circuit Court would have so decided had it found it necessary to reach this question.

CONCLUSION

We respectfully submit that none of the "special and important reasons" required by Rule 19 for an exercise of this Court's discretion to grant a writ of certiorari to review a decision by a Circuit Court of Appeals are present in this case.

The only questions involved in this case, now or at any earlier stage of the proceedings, are the sufficiency of the evidence on the factual questions concerned: the identity of the driver of the automobile which struck the decedent, the presence or absence of negligence or wilfulness on the part of the driver (whoever he was) as the proximate cause of the decedent's death, and the presence or absence of negligence or wilfulness (contributory or sole) on the part of the decedent.

These are all simply evidentiary questions which this Court, with all the questions of real significance before it for decision, ought not to be asked to review.

The decedent's beneficiary has already had three bites at the apple: once in the original state court action in 1957-1958, once before the District Court in the present case, and once before the Circuit Court. No further opportunities for a rehash of the evidence in this case are justified or deserved.

We respectfully submit that the writ of certiorari sought by the petitioner should be denied.

Respectfully submitted,

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Columbia, South Carolina
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